

FITBIT INC,  
Plaintiff,  
v.  
ALIPHCOM, et al.,  
Defendants.

Case No. 16-cv-00118-BLF

## **ORDER GRANTING PLAINTIFF FITBIT, INC.'S MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION**

On March 2, 2017, the Court granted in part and denied in part Defendants AliphCom, Inc. d/b/a Jawbone and Bodymedia, Inc.’s (collectively, “Jawbone”) Motion for Judgment on the Pleadings, finding that U.S. Patent Nos. 8,909,543 (“the ’543 patent”) and 9,031,812 (“the ’812 patent”) were invalid for failure to claim patent-eligible subject matter under 35 U.S.C. § 101, but that U.S. Patent No. 9,042,971 (“the ’971 patent”) was not invalid under those same grounds. ECF 104 (“Order”). Now before the Court is Plaintiff Fitbit Inc.’s (“Fitbit”) Motion for Leave to File a Motion for Reconsideration, which seeks reconsideration of the Court’s decision with respect to the ’812 patent. ECF 108 (“Mot.”). Despite its title, Fitbit’s motion is substantively both a motion for leave to file and a motion for reconsideration itself.<sup>1</sup> For the reasons set forth below, Fitbit’s motion for leave is GRANTED, and the Court deems Fitbit’s motion submitted.

## I. LEGAL STANDARD

A motion for leave to file a motion for reconsideration may be filed prior to the entry of a final judgment in the case. Civ. L.R. 7-9(a). "The moving party must specifically show

<sup>1</sup> The Court recognizes, however, that Fitbit itself does not view its motion in this way and instead also proposes that it be permitted to file a separate motion for reconsideration. *See* ECF 108-1. Because of this, the Court, as discussed below, will allow a reply, which is normally not allowed.

1 reasonable diligence in bringing the motion” and one of the following circumstances:

2 (1) That at the time of the motion for leave, a material difference in fact or law  
3 exists from that which was presented to the Court before entry of the interlocutory  
4 order for which reconsideration is sought. The party also must show that in the  
exercise of reasonable diligence the party applying for reconsideration did not know  
such fact or law at the time of the interlocutory order; or

5 (2) The emergence of new material facts or a change of law occurring after the time  
6 of such order; or

7 (3) A manifest failure by the Court to consider material facts or dispositive legal  
arguments which were presented to the Court before such interlocutory order.

8 Civ. L.R. 7-9(b).

## 9 **II. DISCUSSION**

10 Fitbit argues that reconsideration is appropriate based on a manifest failure to consider  
11 dispositive legal arguments. In particular, Fitbit argues that the Court failed to consider the  
12 argument that the examiner’s statements in the prosecution history were “evidence regarding the  
13 eligibility of the ’812 patent,” which the Court was not entitled to weigh in deciding Jawbone’s  
14 motion under Rule 12(c). Mot. at 1-3, ECF 108. During prosecution, the examiner, in  
15 determining that certain amendments to pending claims saved them from rejection under § 101,  
16 concluded that “displaying a notification message on a mobile device at a specified time and date  
17 where the notification message provides access to an application for interfacing with an activity  
18 monitoring device where a wireless connection exists between the mobile device and the activity  
19 monitoring device is not insignificant.” ECF 74-12. He also determined that the “[a]pplicant  
20 ha[d] added unconventional steps that confine the claim to a particular useful application.” *Id.*  
21 According to Fitbit, these determinations are evidence that the ’812 patent is patent-eligible and,  
22 because Jawbone was not able to rebut this with contrary evidence in the pleadings, the Court was  
23 required to accept this as true. Mot. at 1-2, ECF 108.

24 In its Order, the Court considered the examiner’s statements regarding his determination  
25 that the pending claims were patent-eligible. Order at 29-30, ECF 104. In doing so, it made the  
26 legal determination that, under Federal Circuit law regarding related determinations by the Patent  
27 and Trademark Office and a district court, it “need not defer to the examiner’s conclusions on  
28 patent eligibility.” *Id.* at 29. However, the Court’s Order did not explicitly address the narrow

1 question of whether, even if the Court is not ultimately bound to follow an examiner's conclusions  
2 reached during the patent examination process, the posture of a Rule 12(c) motion restricts its  
3 ability to differ. For example, the Order did not specifically discuss whether the underlying  
4 substance of the determinations made by the examiner, such as that "displaying a notification  
5 message on a mobile device at a specified time and date where the notification message provides  
6 access to an application for interfacing with an activity monitoring device where a wireless  
7 connection exists between the mobile device and the activity monitoring device is not  
8 insignificant," ECF 74-12, is fact which the Court must accept as true. Although the Court is not  
9 persuaded that this rises to the level of "a manifest failure to consider . . . dispositive legal  
10 arguments," the Court finds this issue significant enough to at least exercise its own authority to  
11 *sua sponte* reconsider an interim order and allow Fitbit to move for reconsideration. For this  
12 reason, Fitbit's motion for leave to file a motion for reconsideration is GRANTED.

13 **III. ORDER**

14 Fitbit's motion for leave to file a motion for reconsideration is GRANTED. Its motion for  
15 reconsideration is deemed submitted at ECF 108. Jawbone shall file a response to Fitbit's motion  
16 of no more than five (5) pages by July 10, 2017. Fitbit shall file a reply of no more than five (5)  
17 pages by July 17, 2017.

18 **IT IS SO ORDERED.**

19  
20 Dated: June 26, 2017

  
21 BETH LABSON FREEMAN  
22 United States District Judge

23  
24  
25  
26  
27  
28